

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ZACHARY L. SCHMITZ,

Defendant and Appellant.

C047398

(Super. Ct. No.
03F10491)

Defendant Zachary L. Schmitz entered a negotiated plea of guilty to lewd and lascivious conduct with a child under the age of 14 years (Pen. Code, § 288, subd. (a); further section references are to this code) in exchange for dismissal of 14 other counts of the same crime and a stipulated term of six years in state prison.

Three months later, defendant sought modification of his sentence pursuant to section 1170, subdivision (d). The trial court denied the request.

Defendant appeals from the denial of his request for modification of his sentence.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and asks this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days elapsed, and we received no communication from defendant.

We shall dismiss the appeal because it is from a nonappealable order.

Section 1170, subdivision (d) provides: "When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the Director of Corrections, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Director of Corrections or the Board of Prison Terms, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The resentence under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served."

"Because a defendant does not have standing to bring his own motion under [section 1170, subdivision (d)], the trial court's denial of his request under that section is nonappealable. [Citation.]" (*Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1834, fn. 4.) In other words, the order is nonappealable because it does not affect defendant's substantial rights since he had no right to request resentencing under subdivision (d) of section 1170 in the first instance. (§ 1237, subd. (b); *People v. Pritchett* (1993) 20 Cal.App.4th 190, 194.)

Accordingly, the appeal is dismissed.

SCOTLAND, P.J.

We concur:

SIMS, J.

CANTIL-SAKAUYE, J.